No.

In The

Supreme Court of the United States

October Term, 1995

BERNARD DeANNUNTIS, SR. and ATLANTIC SCIENCE AND TECHNOLOGY, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May the government interrupt a defendants' right to a speedy trial guaranteed by the Sixth Amendment, United States Constitution and 18 U.S.C. § 3161 *et seq.* by sealing an indictment for thirty (30) months during which time the statute of limitations expires, exculpatory evidence is destroyed and the government conducts a separate investigation unrelated to petitioners?

2. Whether this Court's recent decision in *United States v. Gaudin*, __ U.S. __, 115 S. Ct. 2310 (1995) holding it unconstitutional not to submit the issue of "materiality" to the jury in a prosecution for violating 18 U.S.C. § 1001 mandates a new trial?

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Petitioners, Bernard DeAnnuntis, Sr. and Atlantic Science and Technology, Inc. (AS&T) respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in this matter on January 29, 1996.

OPINIONS BELOW

The judgments of the United States Court of Appeals for the Third Circuit are attached as Appendix A and B. The Memorandum Opinion and Findings of Fact and Conclusions of Law of the District Court are attached as Appendix C and D.

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI [1791]:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 3161. Time limits and exclusions:

> (c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within seventy days from the date of such consent.

18 U.S.C. § 3161. Offenses not capital:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

Rule 6(E)(4) Fed. R. Crim. P. Sealed Indictments:

> The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

STATEMENT OF THE CASE

Petitioners Bernard DeAnnuntis, Sr. and Atlantic Science & Technology, Inc. (AS&T) were charged in a four count indictment on October 24, 1991 with violations of 18 U.S.C. § 371 (Conspiracy) § 287 (Submitting False Claims) and § 1001 (False Statement) for offenses committed in 1986 arising out of a $16,300 purchase order contract awarded to AS&T by the Federal Aviation Administration (FAA). The indictment remained under seal until April, 1994 during which time the government conducted a separate investigation, unrelated to Petitioners. A key witness for the government in Petitioners' case, Ramon Garcia, was an undercover operative for the government creating the necessity of sealing Petitioners' indictment while the government and Garcia pursued other interests; Garcia was a former employee of AS&T.

During 1988 and 1989 in two unrelated investigations AS&T produced records pursuant to subpoenas issued by the Department of Defense (DOD) and the Department of Transportation (DOT). These subpoenas grew out of joint investigations being conducted in the Eastern District of Pennsylvania. Included within the volume of documents produced by AS&T were computer floppy disks which contained all of the work product of employee Ramon Garcia for the period 1986 and 1987.

During 1993, an auditor for the Defense Contract Audit Agency (DCAA), advised the Chief Financial Officer of AS&T, Louis DiTomasso, that both investigations had been concluded and that no charges would be filed against AS&T.[1] In June, 1993, consistent with DCAA's advice, the Naval Investigative Service

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1. Unknown to the auditor was the existence of a separate DOT investigation in New Jersey.

(NIS) returned to AS&T the records previously subpoenaed by the DOD. Since most of these records covered the period from 1984-1988, and relying upon the advice of the DCAA auditor, Mr. DiTomasso directed these records be destroyed. As an economy measure, the floppy disks containing Garcia's work product for the years 1986-1987 were erased and the disks reformatted. These floppy disks contained the chronological files of Garcia and the employees who worked for him, and included correspondence, memoranda, technical work, proposals and reports. The information contained on these disks was of critical importance because it could have refuted Garcia's trial testimony regarding the FAA contract at issue.

During a pretrial hearing on then defendants' Motion to Dismiss the Indictment, Agent Robert Brautigam (DOT) testified about the existence of the DOT New Jersey investigation, and that he was unaware of the advice given AS&T by the DCAA auditor or that DOD had returned the AS&T records. Further, he stated that during the period of time in which the indictment was under seal, a separate investigation was being conducted by DOT and the FBI utilizing Ramon Garcia in an undercover capacity. This separate investigation did not involve the Petitioners.

In charging the jury on the elements of Count 4, the false statement charge (18 U.S.C. § 1001), the district court followed Third Circuit precedent and resolved the "materiality" element as a legal question to be decided by the court rather than submitting it to the jury for their consideration. *See United States v. Greber*, 760 F.2d 68 (3rd Cir. 1985).

The United States District Court for the District of New Jersey (Trenton) had jurisdiction pursuant to 18 U.S.C. § 3231. The Court of Appeals for the Third Circuit was vested with jurisdiction via 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT — THAT BEING WHETHER THE PETITIONER'S SPEEDY TRIAL RIGHTS ARE VIOLATED BY THE GOVERNMENT SEALING AN INDICTMENT FOR THIRTY (30) MONTHS DURING WHICH TIME EXCULPATORY EVIDENCE IS DESTROYED AND THE GOVERNMENT CONDUCTS AN UNRELATED INVESTIGATION.

The offense conduct occurred in 1986; the indictment was filed under seal on October 24, 1991 and remained sealed until April, 1994. During the period the indictment was under seal AS&T, in reliance on advise by the government that no charges would be filed as a result of the DOT/DOD investigations discarded evidence that would have proved exculpatory at trial. In addition, while the indictment was sealed the government conducted an unrelated criminal investigation at the expense of Petitioners' rights to a Speedy Trial.

In *Klopher v. North Carolina*, 386 U.S. 213, 223 (1967) this Court stated, "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." The right attaches at the moment the defendant is either formally charged or arrested, whichever is earlier. *United States v. MacDonald*, 456 U.S. 1 (1982). The Court set out a four-part test for evaluating whether a defendant's speedy trial right has been offended in *Barker v. Wingo*, 407 U.S. 514 (1972). *Barker* directs the reviewing court to examine: (a) the length of delay; (b) the reason asserted by the government to justify the delay; (c) the

efforts of the defendant to protect his right; and (d) the degree of prejudice suffered by the defendant because of the delay. *Id.* at 530. Once a violation is found, the only remedy is dismissal of the indictment. *Id.* at 522. In the present case, all four *Barker* factors weigh heavily in Petitioners' favor.

A. Length of Delay

This factor involves two inquiries. First, it is necessary to show that "the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay" in order to trigger the *Barker* analysis. *Doggett v. United States*, 112 S. Ct. 2686, 2690-91 (1992). Here, appellants' right to a speedy trial was activated in October, 1991, when the indictment was filed. Thus, at the time the indictment was unsealed, defendant had been formally accused of criminal conduct for 30 months. Indeed, the trial did not occur until October, 1994, making it three years between indictment and trial. Petitioners easily satisfy this threshold requirement.

The second half of the analysis is, "the extent to which the delay stretches beyond the bare minimum needed to trigger the judicial examination of the claim. This latter inquiry is significant to the speedy trial analysis because ... the presumption that pre-trial delay has prejudiced the accused intensifies over time." *Doggett*, 112 S. Ct. at 2691. The delay in this case substantially exceeds the baseline figure, increasing the severity of the damage to the ability of a defendant to defend himself against the charges. The details of this prejudice, including the loss of potentially exculpatory evidence, are discussed infra in connection with the fourth *Barker* factor.

B. Reason for the Delay

In all likelihood, the government obtained the indictment

when it did in order to toll the statute of limitations, which was due to run during October-November, 1991. *See* 18 U.S.C. § 3282.[2] The delay here resulted in the government's decision to move to seal the indictment. *See* Fed. R. Crim. P. 6(E)(4).

There is simply no statutory or rule authority[3] which permits the government to interrupt the speedy trial process by sealing the indictment for thirty (30) months. Rule 6(E)(4) states:

> (4) Sealed Indictments:
>
> The federal magistrate judge to whom an indictment is returned may direct that *the indictment be kept secret until the defendant* is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons. (emphasis added).

Should this Court place its imprimatur on a 30 month post indictment, post statute of limitations delay so that the government can investigate other parties? There is no support in the decisions of this Court for that result. Here the indictment

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2. The offense conduct occurred in late 1986.

3. The case law has ignored the clear language of the rule and given the Court the right to seal to accommodate law enforcement objectives. *United States v. Lakin*, 875 F.2d 171 (8th Cir. 1989) (indictment sealed for 3 months); *United States v. DiSalvo*, 34 F.3d 1204 (3rd Cir. 1994) (indictment sealed for 5 months). Some courts have held it to be improper to seal an indictment in order to complete investigations into other offenses. *Avalos v. United States*, 541 F.2d 1100, 1114 (5th Cir. 1976); *United States v. Rogers*, 781 F. Supp. 1181 (S.D. Miss. 1991).

alleged an offense which occurred in December, 1986; the indictment was unsealed 7 years and 4 months following the offense. The trial took place almost 8 years from the offense conduct.

Again, it is not possible to justify the inordinate delay, where as here the delay was occasioned by the investigation of others. The attitude of "we'll prosecute you when we get around to it," is totally inconsistent with the fundamental right to a speedy trial.

C. Assertion of the Right to a Speedy Trial

Petitioners obviously win on this prong as well. By having the indictment sealed, the government chose to conceal from them that they were under indictment. They simply did not and could not know they had been charged. *See Doggett*, 112 S. Ct. at 2691 (defendant was ignorant of indictment, therefore demand for speedy trial at time of arrest was timely). Defendants' pretrial motion to dismiss was the absolute earliest time they could have demanded a speedy resolution of the case, and they are therefore "entitled to strong evidentiary weight in determining whether [he] is being deprived of the right." *Barker*, 407 U.S. at 531-32.

D. Prejudice to the Defense Case

The loss of important and irreplaceable exculpatory evidence due to the delay erases any residual doubts that Petitioners' right to a speedy trial was violated. The Court in *Barker* explained that the "most serious" interest that the Speedy Trial Clause protects is, "to limit the possibility that the defense will be impaired . . . because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." 407 U.S. at 532. While "affirmative proof of particularized prejudice is not essential to every speedy trial

claim," *Doggett*, 112 S. Ct. at 2692, the presence of actual, demonstrable prejudice here sharply distinguishes this case from the overwhelming majority of cases in which the defendant relies on the presumption of prejudice alone. *See, e.g., United States v. Loud Hawk*, 474 U.S. 302, 315 (1986).

The loss of exculpatory materials directly and overwhelmingly damaged the defense case. Petitioners were effectively precluded from cross-examining Ramon Garcia with the very documents that would have refuted his testimony.

The delay has also harmed Petitioners in ways that are less easily demonstrated. This Court recognized that undue pre-trial delays like the one at issue here results in "prejudice if defense witnesses are unable to recall accurately events of the distant past," *Barker*, 407 U.S. at 532, and also, that "time's erosion of exculpatory evidence and testimony 'can rarely be shown'." *Doggett*, 112 S. Ct. at 2692-93, *quoting Barker*, 407 U.S. at 532. Indeed, the Court quite realistically noted that "excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter identify." *Doggett*, 112 S. Ct. at 2693.

In concluding it is important to note the district court's findings. The court found: That AS&T Secretary Treasurer Louis DiTomasso was told by the government auditor that the DOD and DOT investigations had concluded; that DOD returned the subpoenaed records to AS&T in June, 1993 and that Agent Brautigam was unaware of the return of the records; that Mr. DiTomasso believed that both investigations had been completed and directed that the returned records be destroyed; that included in the returned documents was a large quantity of "floppy" computer disks containing, among other things, the chronological files of all materials (correspondence, memoranda, technical work, proposals, reports) typed for

AS&T's Cherry Hill office employees; among these employees were Ramon Garcia and the engineers who reported to him; that AS&T erased and reformatted the floppy disks; that the pertinent records that were destroyed by AS&T consisted of computer disks containing the typing of Ramon Garcia. *See*, Appendix D, pp. 24a-27a.

Critical to this Court's ultimate analysis is the fact that the district court below *did not* make a finding that Petitioners *were not* prejudiced by this loss of records.

II.

THE COURT OF APPEALS FOR THE THIRD CIRCUIT HAS IGNORED A CONTROLLING DECISION OF THIS COURT.

Chief Judge Anne Thompson charged the jury as to the false statement count (18 U.S.C. § 1001) in pertinent part as follows:

> We are going now to the last count, Count 4 of the indictment, which charges the defendants knowingly and willfully falsified, concealed and covered up by trick, scheme and device material facts within the jurisdiction of the FAA in violation of 18 U.S.C. § 1001. . . .
>
> First: that a defendant knowingly concealed, falsified, or covered up a fact by trick, scheme or device as set forth in Count 4 of the indictment.
>
> Second: in doing so, the defendant acted knowingly and willfully.

> Third: the fact or facts concealed, falsified or covered up were material.
>
> Fourth: the subject matter involved was within the jurisdiction of any department or agency of the United States.
>
> Fifth: the defendant was under a duty to disclose the facts which were concealed, falsified or covered up.
>
> *Going over those elements, the judge must decide Element Three concerning materiality*, Element Four concerning jurisdiction of the United States and Element Five concerning a duty to disclose. *So those are the judge's responsibilities to decide.* [Emphasis added].
>
> You are to decide Element One concerning whether a defendant concealed, falsified or covered up a fact or facts, and Element Two, whether in this regard a defendant acted knowingly and willfully. *So you only have those two elements to decide.* [Emphasis added].
>
> *You are instructed if you find that the contractor was not performing in accordance with the contract's requirements, that would be a material fact. So that would be Element Three, already decided. . . .* [Emphasis added].

On the day it was given, the charge that materiality was

reserved for the trial court's determination was correct. For almost a decade, the law in the Third Circuit has been that materiality is an essential element of a Section 1001 offense, and that it is a question of law which is reserved for the court. *United States v. Greber*, 760 F.2d 68, 73 (3rd Cir. 1985). Petitioners did not object to this portion of the charge.

On June 19, 1995, this Court decided *United States v. Gaudin*, __ U.S. __, 115 S. Ct. 2310 (1995). In *Gaudin*, Justice Scalia — writing for a unanimous Court — said that "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged. The trial judge's refusal to allow the jury to pass on the "materiality" of Gaudin's false statements [in an 18 U.S.C. § 1001 case] infringed that right." In so holding, the Court overruled *Sinclair v. United States*, 279 U.S. 263 (1929) and affirmed the decision of the Ninth Circuit below at 28 F.3d 943 (9th Cir. 1994).

Gaudin unquestionably applied to the present case, which was squarely on the path of direct review.[4] *Powell v. Nevada*, __ U.S. __, 114 S. Ct. 1280, 1283 (1994). This is true even though *Gaudin's* ruling constitutes a "clear break" with past precedent in the circuit. *Griffith v. Kentucky*, 479 U.S. 314 (1987).

Probably half of the testimony in this case related — in one way or another — to the question of materiality. The government urged that the defendants did not, by design, perform in accordance with the contract's requirements and concealed that fact from the government; the defense demonstrated that the contract had been complied with, that the prosecution's reading of the contract was wrong, and that the FAA had received as

4. Petitioners were sentenced on April 18, 1995, and Notices of Appeals were timely filed.

much, and arguably more, than it had contracted for. The trial court's taking this major issue away from the jury's determination, and its instruction that the issue was "already decided," constituted error that was plain and that affected the most substantial rights of these Petitioners. A new trial on Count 4 was mandated.

Petitioners respectfully request that this Honorable Court grant their Petition for Certiorari.

CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully request that a Writ of Certiorari issue to review the decision below.

Respectfully submitted,

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APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JANUARY 31, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5286

UNITED STATES OF AMERICA

v.

BERNARD DEANNUNTIS, SR.

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 91-cr-00480-3)
District Judge: Honorable Anne E. Thompson

Submitted Under Third Circuit LAR 34.1(a)
January 26, 1996
Before: STAPLETON, MANSMANN and LEWIS,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant that:

1) he was denied his right to a speedy trial as a result of the government sealing the indictment for thirty (30) months during which time evidence that could have exculpated defendants was destroyed;

Appendix A

2) whether the evidence was sufficient to support a verdict of guilty;

3) whether the district court erred by admitting evidence pursuant to Rule 404(b) Federal Rules of Evidence, where the prejudicial nature of such evidence far exceeded its probative value; and

4) whether a new trial on count 4 is mandated by the Supreme Court's recent decision in *United States v. Gaudin*, 1995 WL 360212, June 19, 1995, holding it unconstitutional not to submit the issue of "materiality" to the jury in a prosecution for violating 18 U.S.C. § 1001; it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/ Carol Los Mansmann
Circuit Judge

Attest:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

JAN 31 1996

APPENDIX B — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JANUARY 31, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-5287

UNITED STATES OF AMERICA

v.

ATLANTIC SCIENCE AND TECHNOLOGY CORPORATION,

Appellant

Appeal from the United States District Court
for the District of New Jersey
(D.C. Crim. No. 91-cr-00480-4)
District Judge: Honorable Anne E. Thompson

Submitted Under Third Circuit LAR 34.1(a)
January 26, 1996
Before: STAPLETON, MANSMANN and LEWIS,
Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant that:

1) he was denied his right to a speedy trial as a result of the government sealing the indictment for thirty (30) months during which time evidence that could have exculpated defendants was destroyed;

Appendix B

2) whether the evidence was sufficient to support a verdict of guilty;

3) whether the district court erred by admitting evidence pursuant to Rule 404(b) Federal Rules of Evidence, where the prejudicial nature of such evidence far exceeded its probative value; and

4) whether a new trial on count 4 is mandated by the Supreme Court's recent decision in *United States v. Gaudin*, 1995 WL 360212, June 19, 1995, holding it unconstitutional not to submit the issue of "materiality" to the jury in a prosecution for violating 18 U.S.C. § 1001; it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

s/ Carol Los Mansmann
Circuit Judge

Attest:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

JAN 31 1996

Certified as a true copy and issued in lieu
of a formal mandate on February 22, 1996

Teste: s/ R. Douglas Sisk

Clerk, U.S. Court of Appeals for the Third Circuit.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED APRIL 18, 1995

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 91-480 (AET)

THE UNITED STATES OF AMERICA

v.

CAESAR CAIAFA, LAWRENCE NERI, BERNARD DEANNUNTIS, SR., and ATLANTIC SCIENCE & TECH., INC.

OPINION

THOMPSON, Chief Judge

This matter is before the Court on defendant Caesar Caiafa's motion for judgment of acquittal or, in the alternative, for a new trial pursuant to Fed. R. Cr. P. 33 and 34. Defendants Deannuntis and Atlantic Science & Technology ("AS&T") have joined in the motion. The Court, having thoroughly considered the parties' positions advanced at oral argument and in their written submissions, will deny defendants' motion.

Background

The indictment in the present case originally contained four counts, one of which the Government voluntarily dismissed. The remaining three counts are:

Appendix C

1. Conspiracy to commit an offense (fraud) against the United States Government in violation of 18 U.S.C. § 371;

2. Presentation of a false or fraudulent claim against the United States Government in violation of 18 U.S.C. § 287; and

3. Knowing and wilful falsification, concealment or covering up by trick, scheme and device material facts within the jurisdiction of the FAA in violation of 18 U.S.C. § 1001.

After a nine day trial, the jury was charged, deliberated for four days and returned a verdict of not guilty on all counts for defendant Neri, and a verdict of guilty on all counts for defendants Caiafa, Deannuntis and AS&T. The Court then enlarged the time within which the defendants were to file post trial motions. The defendants timely filed the motion for a new trial now before the Court.

Defendants raise eight issues:

1. The verdict is against the weight of the evidence;

2. The indictment fails to charge and the prosecution failed to prove an offense relating to AS&T's purported failure to "write a report as part of its performance under the 708 purchase order;"

Appendix C

3. The direct examination of Government witnesses Bruce Singer and Marilyn Knopp regarding their interpretations of the 708 purchase order was prejudicial and improper in violation of Fed. R. Evid. 701;

4. The Government's cross-examination of defendant Caiafa was improper and prejudicial and violated defendant Caiafa's Sixth Amendment right to confront witnesses;

5. The Government improperly elicited testimony from Ramon Garcia and Guadolupe Torres about other "bad acts" causing prejudice to defendants and violating Fed. R. Evid. 404(b);

6. The jury should have been instructed that good faith was a complete defense to the crimes charged;

7. The Court should have taken additional steps to cure the jury's evident confusion over the construction of the indictment and the elements of the crime of conspiracy; and

8. The cumulative effect of the aforementioned errors requires that defendants receive a new trial.

The Court heard argument and denied defendants' motions

regarding most of these issues during trial. The Court is satisfied that it need only formally address the cross-examination of defendant Caiafa (with respect to Bobby McCloud) and the admission of other bad acts evidence under Fed. R. Evid. 404(b). The Court will deny defendants' motion without discussion as to the remaining issues.

A. Caiafa Cross-Examination

The Government cross-examined defendant Caiafa regarding an individual named Bobby McCloud. McCloud was a contractor who knew defendant Caiafa, but whom the Government did not call as a witness. The following testimony is at issue:

Q. Do you recall one of your infrequent meetings in your office where you called him in? You were very angry. And you told Bobby McCloud you weren't getting your money from AS&T?

A. Absolutely not.

Q. You told him to go back to Charlie Lagrossa and tell him that?

A. Absolutely not.

Q. You said, Tell Charlie I want my money.

A. Absolutely not.

Q. Do you recall another meeting about two

weeks later where he brought up another invoice and you told Bobby McCloud you needed 1,500 bucks right away, and you didn't care where you got it?

A. That' s absolutely untrue.

Q. You needed some money to fix one of your cars and you were short?

A. Absolutely untrue.

Q. And then two weeks later didn't you call him and meet him at a fast food restaurant? Do you recall that?

A. Not that I recall.

Q. He drove up from Washington and you told him again you needed money to fix one of your cars?

A. I never on any occasion, Mr. Smith, asked Bobby McCloud for one single penny.

Q. You told him that you had done your job and that Charlie and AS&T were stiffing you?

A. I never, ever told him that.

(Tr. at 8.22, 1. 25 to 8.24, 1.2.) Defendant Caiafa contends that

this line of questioning violated his Sixth Amendment right to confront McCloud as well as Fed. R. Evid. 608(b).

B. Other Bad Acts Testimony

The second issue the Court will address is whether the Government properly elicited testimony from its witness Ramon Garcia regarding certain conversations he had with defendants Caiafa and Neri. Specifically, Garcia testified that he and defendants Caiafa and Neri discussed the possibility of Garcia's creating a minority owned "8A" company to which defendants Caiafa and Neri would funnel federal contracts. In exchange for directing work to the 8A company, Garcia was to provide them with equal partnership interests in the 8A company at a later date, after defendants Neri and Caiafa left the FAA. (Tr. 2.132-2.135.) Garcia testified that the conversations he had with defendants regarding this scheme occurred in the Spring of 1987, after the events charged in the indictment *sub judice*. Garcia also testified that while discussing this scheme, Caiafa admitted to Garcia that he had accepted funds from AS&T. According to Garcia, Caiafa stated that once he had paid off his car lease he would no longer accept money from defendant corporation. Garcia also testified that Caiafa "told me that he was supposed to place contracts at [AS&T] just as Mr. Jadico had from the Navy. And that when sufficient work had been placed at AS&T, he was to leave the Government and become a partner in the firm just as Mr. Jadico had done." (Tr. 2.133-34.) (Jadico is a partner at AS&T.) Defendants argue that this testimony was inadmissible under Fed. R. Evid. 403 and 404(b).

Similarly, defendants argue that the Court erred by admitting, under Fed. R. Evid. 404(b), portions of the testimony of Guadolupe Torres. Defendants object to Torres' testimony

that Deannuntis approached Torres several times asking him to contribute between $1,500 and $2,000 per month "to take care of friends in the FAA or FAA officials. I forget exactly how [Deannuntis] characterized it." (Tr. 115, ll. 6-7.) Torres further testified that Torres repeatedly declined to contribute money to the fund, explaining that he would have to think about it. Torres stated that another AS&T principle, Mr. Valenti, approached him with the same request indicating that "the rest of them were contributing." (Tr. 5.117, ll. 22-23.) Torres testified that he understood this to mean that all of the principals of AS&T were contributing to this "fund." (Tr. 5.117-18.)

Discussion

I. Caiafa Cross-examination

Defendants contend that the Government's cross-examination of defendant Caiafa regarding Bobby McCloud was improper because it violated the Federal Rules of Evidence and because it violated defendant Caiafa's Sixth Amendment right to confront a witness being offered against him. The Court will address each argument separately, beginning with defendant's constitutional claim.

A defendant in a criminal trial has the right under the Sixth Amendment to confront those witnesses against him. *United States v. McGlory*, 968 F.2d 309, 343 (3d Cir.), *cert. denied*, 113 S. Ct. 1388 (1992). The term "confront" guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way and to whatever extent the defense may wish." *Id.* (citing to *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)(per curiam)(emphasis in original)). The right to confront applies to witnesses who have

actually testified before the jury as well as to "an absent witness whose words are recited as true." *Steele v. Taylor,* 684 F.2d 1193, 1200 (6th Cir. 1982), *cert. denied,* 460 U.S. 1053 (1983).

In *Douglas v. State of Alabama,* 380 U.S. 415 (1965), the prosecutor called as a witness a Mr. Loyd who had already been tried and convicted for participating in the crime with which defendant Douglas was charged. Loyd refused to testify, asserting his Fifth Amendment privilege on the ground that he had an appeal of his conviction pending. Nevertheless, the prosecution read into the record what was purported to be Loyd's signed confession. The prosecutor paused after every few sentences to ask Loyd whether he had made the statements. Loyd repeatedly refused to answer. This process continued until the entire document had been read. Defendant Douglas was unable to cross-examine Loyd who continued to assert his Fifth Amendment privilege. Most significantly, the only direct evidence of certain key facts came from Loyd' s purported confession. The Supreme Court concluded that although the prosecutor's reading of Loyd's alleged statement was not testimony, it may well have been equivalent in the jury's mind. Therefore, the Supreme Court held that Douglas' Sixth Amendment right to confront had been violated.

Similarly, several state courts have concluded that a prosecutor may not ask a witness questions which assume as true facts not already in evidence, especially where the testimony of another person would be required to establish those facts. *See, e.g., State of Idaho v. Stewart,* 595 P.2d 719 (Idaho 1979); *State of Missouri v. Callahan,* 641 S.W.2d 186 (Mo. App. 1982); *State of Kansas v. Warren,* 635 P.2d 1236 (Kan. 1981). In each of these state court cases, the prosecutor asked questions or made comments which put before the jury statements of individuals

who had not been not called to testify, e.g.: asking a defendant if he knew that someone had identified him at the scene of the crime. *Warren,* 635 P.2d at 1238-39; asking a defendant if he knew "of any reason why she would say [defendant was at the scene of the crime at] 10:30 in the evening?" *Callahan,* 641 S.W.2d at 188; asking a defendant about the contents of a statement made by a co-participant in the crime that the defendant had gone to the store in furtherance of plans to burglarize it. *Stewart* 595 P.2d at 185.

The present case is distinguishable from those cases where a Sixth Amendment violation has been found. Unlike in *Douglas,* the Government' s questioning of Caiafa was not a monologue which presented to the jury direct statements of an individual who did not testify. Rather the Government asked a total of eight separate questions regarding comments defendant *Caiafa allegedly made* to McCloud. Defendant answered each of them individually. None of the Government' s questions assumed as true facts not in evidence. The Government did not ask Caiafa about comments made by others, rather it asked Caiafa about his own actions and statements. Asking a witness whether he engaged in certain conduct or made certain comments to others is perfectly acceptable. To require the Government to call a witness every time an individual is identified in this type of questioning would far exceed the requirements of the Sixth Amendment. While posing the questions with reference to McCloud may have brought the Government into dangerous territory, the Court concludes that defendants' Sixth Amendment rights were not violated.

In addition, the Court's jury instructions included language designed specifically to address this issue:

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During the course of the trial the attorneys for the Government as well as for the defendants have made numerous arguments and statements before you. Statements of counsel are for the purpose of attempting to persuade you as to their view of what the evidence has shown and, accordingly, should be regarded by you not as evidence but as argument.

Statements of fact contained within a lawyer's question are not evidence. For example, if one of the lawyers had asked a witness, "Isn't it a fact that you own a refrigerator?" and the witness answered, "No," you are not to assume from the manner in which the question was asked that the witness *must* in fact be lying, and that he in fact does own a refrigerator. In this particular example, there would be no evidence that the witness owned a refrigerator based on this question, since the witness answered, "No." There would have to be other evidence presented that the witness owned a refrigerator.

Limiting instructions similar to this have been held sufficient, in some cases, to avoid the need for a new trial. *See Callahan*, 641 S.W.2d at 189 (citing *State v. Butler*, 549 S.W.2d 578 (Mo. App. 1977). This Court's admonition to the jury lends further support to the conclusion that a new trial in the present case is unnecessary.

The next issue the Court will address is whether the Government's questions were permissible under the Federal

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Rules of Evidence. At trial, it appeared that the questions were offered under Fed.R.Evid. 611(b). Rule 611(b) permits questions about issues raised on direct as well as "inquiry into additional matters as if on direct examination." On direct, Caiafa testified as follows:

> Q (by De Luca): Did anyone from AS&T, anyone whatsoever from AS&T ever give you one cent toward leasing that automobile?
>
> A (by Caiafa): Absolutely not.

(Tr. 7.166 ll. 8-10.) Moreover, the Government presented extensive evidence during its case in chief that the kickbacks Caiafa accepted were used for his automobiles. The Government spent a significant amount of time at trial reviewing cash deposits to Caiafa's bank accounts and their relationship to the timing of Caiafa's lease payments. Given the evidence the Government had already presented and Caiafa's testimony that he never accepted money from AS&T for his car lease, the Court is satisfied that the Government's cross-examination was proper. *See generally Williams v. Giant Eagle Markets, Inc.*, 883 F.2d 1184, 1191 (3d Cir. 1989); *United States v. Segal*, 534 F.2d 578, 583 (3d Cir. 1976) and *Lis v. Robert Packer Hospital*, 579 F.2d 819 (3d Cir.), *cert. denied*, 439 U.S. 955 (1978). The Court notes that the Government's cross examination on this topic was limited and not repetitive. Defendant' s firm, negative responses sufficiently ameliorated any harm. Since, the Government had a good faith belief for asking about Caiafa's comments to McCloud, namely McCloud's prior statements to Government agents, the Court concludes that this line of questioning was permissible.

The defense argues that the McCloud line of questioning

violated Fed. R. Evid. 608(b). Under Rule 608(b), a witness may be impeached by cross-examination as to specific conduct where, in the discretion of the court, the conduct is probative of the witness' character for truthfulness. Whether certain statements or acts are probative of truthfulness is interpreted narrowly. *United States v. Bocra*, 623 F.2d 281, 288 (3d Cir. 1980), *cert. denied*, 449 U.S. 875 (1980). The district must be careful to ensure that the questions are designed to elicit information regarding veracity and not to present otherwise inadmissable evidence to the jury. *Id.* Moreover, Rule 608(b) is closely tied to Rule 403 and therefore the Court must determine that the evidence's probative value outweighs its danger of prejudice. *Id.* The Third Circuit has expressed the view that, at least under some circumstances, cross-examination of a witness concerning allegations of bribery may not be probative of truthfulness. *United States v. Rosa*, 891 F.2d 1063 (3d Cir. 1989). The Fourth, Fifth and Sixth Circuits, however, have held that bribery is in fact probative of truthfulness. *See United States v. Waldrip*, 981 F.2d 799, 804-804 (5th Cir. 1993)(citing *United States v. Hurst*, 951 F.2d 1490, 1500-01 (6th Cir. 1991), *cert. denied*, 112 S. Ct. 1952 (1992)) and *United States v. Leake*, 642 F.2d 715 (4th Cir. 1981). The Sixth Circuit, noted that the language in *Rosa* might be read as only a partial moratorium on cross-examining a witness about allegations of bribery to attack the witness' credibility. *Hurst*, 951 F.2d at 1500. This Court similarly concludes that under certain circumstances *Rosa* is not a bar to impeachment by cross-examination regarding allegations of bribery.

In the present case, the disputed line of questioning went beyond mere allegations of attempting to bribe a public official. The Government asked whether Caiafa had already accepted a bribe to defraud the Government, had already fulfilled his end of

the bargain and was now waiting to receive money. Caiafa denied all of the Government' s questions. Hence, no evidence was put before the jury involving the allegations of bribery. Caiafa's negative answers coupled with the Court's jury instruction not to consider as evidence statements of counsel lead this Court to conclude that, under the facts presented here, a new trial is not warranted.

II. Fed.R.Evid. 404(b) Evidence

Defendants argue that the testimony of two Government witnesses, Torres and Garcia, regarding other bad acts performed by defendants, violated Federal Rules of Evidence 402, 403 and 404(b).[1] Under Rule 404(b) evidence of other crimes or wrong acts is inadmissible to show "the character of a person in order to show conformity therewith. It may, however, be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . ." The Supreme Court has crafted a three step analysis for determining whether evidence of other bad acts should be admitted. First, the trial court must determine whether the evidence is offered for a proper purpose under Rule 404(b), second the court must determine whether the evidence is relevant under Rule 402 and third the court must ascertain whether the probative value of the evidence is substantially outweighed by undue prejudice to the defendant under Rule 403. *Huddleston v. United States*, 485 U.S. 681, 691 (1988)(discussing similar acts under Rule 404(b)). Generally the Rule 402 and Rule 404(b) analyses are very similar, hence the Third Circuit has set forth a two part test which first requires a

1. Fed.R.Evid. 402 deals with relevance. Fed.R.Evid. 403 permits the court to exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice or various other considerations.

Rule 404(b) analysis and then a Rule 403 analysis. *See United States v. Jemal*, 26 F.3d 1267, 1272 (3d Cir. 1994); *United States v. Himmelwright*, 1994 WL 661043 (3d Cir. 1994). The Supreme Court has also held that the trial court should give a cautionary instruction pursuant to Fed. R. Evid. 105 upon request of the parties. *Huddleston*, 485 U.S. 691.

A. Admissibility under Rule 404(b)

Evidence of prior bad acts is generally admissible under Rule 404(b) where the party offering the evidence "clearly articulate[s] how that evidence fits into a chain of logical inferences, no link of which can be the inference that because the defendant committed [similar offenses] before, he therefore is more likely to have committed this one." *United States v. Sampson*, 980 F.2d 883, 887 (3d Cir. 1992). Hence, where "the evidence . . . tends to prove some fact besides character, admissibility depends upon whether its probative value outweighs its prejudicial; effect." *Id.* (citing *Government of Virgin Islands v. Harris*, 938 F.2d 401, 419 (3d Cir. 1991)).

In the present case, Garcia's testimony went beyond mere character and tended to prove opportunity. The Court is cognizant that Garcia testified to conversations which occurred several months after the events charged in the indictments occurred. However, the evidence indicates that there had been no significant change in the employment or status of any of the relevant actors between the dates directly related to the indictment and the time that the conversations about which Garcia testified occurred.[2] This consistency is essential to the link between the Garcia testimony and the indictment.

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2. To some extent Deannuntis' status changed. Evidence was presented that he was not on the AS&T payroll between April and August of 1986. (Cont'd)

Garcia testified that he and Caiafa had discussed the possibility that Caiafa would channel work to a new 8A company to be created and operated by Garcia. Once the company had grown to an adequate size, Caiafa would leave the FAA and join the company. Although the indictment charges that Caiafa accepted kick backs, there was testimony at trial that Caiafa had crafted a similar strategy to leave the FAA and join AS&T. (Tr. 2.133.) While these conversations do not directly prove that Caiafa had the opportunity to carry out the proposed plan, his discussing a scheme containing so many of the elements in the indictment in such close proximity to the events charged in the indictment tends to show that he had the opportunity and the ability to direct work to a given company because of his position with the FAA. This issue was vigorously contested by the defendants both on cross-examination and by the testimony of their own witnesses. As the Court stated during the trial, the relationships among these witnesses and their juxtapositions with each other are significant issues. Garcia' s testimony is probative of the context in which defendants and other individuals knew each other, conducted business and conversed on matters of importance. *See generally, United States v. Simmons*, 679 F.2d 1042, 1049-50 (3d Cir. 1982)(evidence properly admitted as background and to show ongoing relationship among the parties); *United States v. O'Leary*, 739 F.2d 135, 136-37 (3d Cir. 1984)(evidence properly admitted to show background, parties familiarity with one another and concert of action). The Court notes that Garcia's testimony also

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(Cont'd)

However, evidence was also presented that Deannuntis was nevertheless very involved in AS&T's operations during that time. Moreover, the charges in the indictment extend well beyond August of 1986 when Deannuntis began receiving a salary from AS&T.

set forth the context in which Caiafa allegedly admitted to Garcia that he was accepting funds from AS&T.

With respect to the Torres testimony, the Court instructed the jury his testimony could not be used as evidence against Caiafa or Neri because it related only to AS&T and Deannuntis. The Government's articulated reason for Torres' testimony, and the reason this Court permitted the testimony, was that it tended to show both opportunity and the nature of the relationships among the parties. Torres' testimony helps to identify Deannuntis as an executive at AS&T who had the backing of at least one other AS&T executive for the creation of a "slush fund." This information is relevant to the charged offenses because it tends to show that Deannuntis was in a position at AS&T to effect the conspiracy with which he was charged. As the Court stated during trial:

> Though the application or request to Torres to throw in money to a slush fund is not the same kind of illegal payment to federal officials that makes up the charges in the indictment, nevertheless it is sufficiently close in character that I believe it is highly relevant. Deannuntis' own statements would be highly probative against Deannuntis and against AS&T. . . . We are talking about the same people, the same kind of offense.

(Tr. 5.3, l. 22 - 5.4, l. 15.) Therefore, the Court concludes that the Torres testimony was admissible under Rule 404(b).

B. Rule 403 Balancing

Rule 403 bars the admissibility of evidence where the risk of

prejudice to the defendant *substantially* outweighs the probative value of the evidence. *Harris*, 938 F.2d at 420. In the present case, the Court is satisfied that neither Garcia's nor Torres' testimony was improperly prejudicial. All of the 404(b) evidence at issue involved statements by defendants to Garcia or Torres consistent with the type of conduct charged in the indictment. None of the evidence was unusual, explosive in nature or so extreme as to incite an irrational decision by the jury. *United States v. Jackson*, 761 F.2d 1541, 1544 (11th Cir. 1985). Moreover, the Government did not place exceptional significance on this evidence in its closing arguments and the 404(b) evidence did not account for a large portion of the testimony at trial. In addition, the Court gave a jury instruction about 404(b) evidence at the close of trial as well as special admonitions directly after both Garcia's and Torres' 404(b) testimony. *Huddleston*, 485 U.S. 691-692.

The effect of the 404(b) evidence must be examined in the context of the other evidence presented. *See generally, United States v. McGlory*, 968 F.2d 309, 339 (3d Cir. 1992). The Government presented extensive testimony by Garcia directly relating to the events charged in the indictment and testimony by several individuals employed by the FAA in 1986 and 1987. Without the 404(b) evidence, the Government had likely produced sufficient testimony to return convictions for Caiafa, AS&T and Deannuntis on all three Counts of the indictment. However, the 404(b) evidence presented the jury with a broader more comprehensive picture of the significant players, their interrelationships and their roles within their separate organizations. Therefore, the Court concludes that any prejudice which may defendants may have suffered because the Court admitted 404(b) evidence was outweighed by the probative value of the evidence.

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Conclusion

In light of the foregoing, defendants' motion for a judgment of acquittal or in the alternative for a new trial will be denied. An appropriate Order is filed herewith.

April 18, 1995

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 91-480 (AET)

THE UNITED STATES OF AMERICA

v.

CAESAR CAIAFA, LAWRENCE NERI, BERNARD DEANNUNTIS, SR., and ATLANTIC SCIENCE & TECH., INC.

ORDER

For the reasons set forth in the Opinion filed herewith, it is on this 18th day of April 1995

ORDERED that defendants' motion for a new trial be and hereby is denied.

s/ Anne E. Thompson
ANNE E. THOMPSON, CHIEF JUDGE

APPENDIX D — FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED SEPTEMBER 1, 1994

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 91-480

UNITED STATES OF AMERICA

v.

CAESAR CAIAFA, et al.

Findings of Fact and Conclusions of Law

This matter is before the Court on defendants' motions to dismiss the indictment for violations of their right to a speedy trial under the Sixth Amendment. The following attorneys have appeared in this matter: Jeffrey Smith, Assistant United States Attorney on behalf of the United States, Thomas Green, Esq. of Sidley and Austin on behalf of Caesar Caiafa, Eric Kraeutler, Esq. of Morgan, Lewis & Bockius on behalf of Lawrence Neri, Thomas Bergstrom, Esq. on behalf of Bernard Deannuntis, Sr., and Robert Delucas, Esq. on behalf of Atlantic Science and Technology, Inc. The Court held an evidentiary hearing on August 4, 1994. For the reasons set forth below, the Court will deny defendants' motions.

Findings of Fact

1. Defendant Atlantic Science & Technology, Inc. ("AS&T") produced records pursuant to two subpoenas duces

tecum: the first subpoena was issued by the Department of Defense Office of Inspector General ("DOD") and dated December 23, 1988 (DiTomasso, Tr. 6); the second subpoena was issued by the Department of Transportation Office of Inspector General ("DOT") and dated July 14, 1989. (DiTomasso, Tr. 8.)

2. Certain records, including typing files of Ramon Garcia maintained on computer discs, were called for by both subpoenas and were produced to the DOD. (DiTomasso, Tr. 9.)

3. The DOD and DOT worked jointly on an investigation based in the Eastern District of Pennsylvania. The DOT initiated a separate investigation, with the Federal Bureau of Investigation, in the District of New Jersey. (Brautigan, Tr. 91.)

4. All defendants were indicted in this case on October 24, 1991. The Government moved to have the indictment sealed until further Order of the Court. The Court granted the Government's motion and the indictment remained sealed until April of 1994 at which time defendants first became aware of the indictment against them.

5. In 1993, AS&T Secretary Treasurer Louis DiTomasso was told by Thomas DeNofa, an auditor with the Defense Contract Audit Agency ("DCAA"), that the DOD and DOT investigations had concluded. (DiTomasso, Tr. 17.)

6. Neither the DCAA nor DeNofa were aware of or a part of the DOT's New Jersey investigation. (DiTomasso, Tr. 37; Brautgan, Tr. 91.)

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7. DOT case agent, Robert Brautigan, never told DeNofa, anyone else with the DCAA or anyone at AS&T that the DOT investigation had concluded. (Brautigan, Tr. 91-92; DeNofa, Tr. 69.)

8. No one associated with the prosecution of this case ever told DiTomasso that the DOT investigation was concluded. (DiTomasso, Tr. 45.)

9. The DOD returned subpoenaed records to AS&T in June 1993. (DiTomasso, Tr. 22.) DOT agent Brautigan was unaware of the return of the records. (Brautigan, Tr. 108.)

10. Prior to the return of the documents, defendant AS&T submitted its costs for both investigations and was paid. Apparently, AS&T had been informed that payment would only be made upon conclusion of a pending investigation.

11. DiTomasso knew that records produced to the DOD were also called for by the DOT subpoena. (DiTomasso, Tr. 41.)

12. DiTomasso believed that both investigations had been concluded. However, DiTomasso did not, either personally or through his attorney, seek confirmation of his belief from DOT or AS&T's counsel. (DiTomasso, Tr. 42.)

13. DiTomasso directed that the returned DOD records be destroyed. (DiTomasso, Tr. 40.)

14. Included in the returned documents was a large quantity of "floppy" computer disks containing, among other things, the chronological files of all materials (correspondence, memoranda, technical work, proposals, reports) typed for

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AS&T's Cherry Hill office employees; among these employees were Ramon Garcia and the engineers who reported to him. AS&T erased and reformatted the floppy disks.

15. The pertinent records that were destroyed by AS&T consisted of computer discs containing the typing of Ramon Garcia.

16. It appears that only final documents, not drafts or revisions, would have been maintained on computer discs. (English, Tr. 56.)

17. The "primary record" of Garcia's work is contained in time cards, which have been preserved. (DiTomasso, Tr. 27.)

18. DiTomasso did not know what was contained on Garcia's computer discs and could not identify any specific work done by Garcia pertaining to the contract at issue in this case that would have been recorded on computer discs. (DiTomasso, Tr. 48.)

19. Hard, or paper, copies of work product typed by or for Garcia should also have been maintained by AS&T in separate project manager files. (DiTomasso, Tr. 50.)

20. Project manager files were among those records subpoenaed by the DOT. Such files and any work product contained in them should have been produced pursuant to the subpoena. (DiTomasso, Tr. 51.)

21. The Government argues that as a consequence, computer discs would only reproduce what was contained in AS&T's other files (*id.*), despite DiTomasso's testimony that the

results of Garcia's work could be found on computer discs. (DiTomasso, Tr. 34.)

22. Defendant Caesar Caiafa was employed in the Federal Aviation Administration ("FAA") Technical Center from 1969 through 1989. In 1989, over two years before he was indicted, he resigned.

23. Defendant Caiafa testified that he maintained personal files regarding contract 708. The files contained personal notes relating to appointments, contract meetings and telephone conversations with both FAA and AS&T personnel. When defendant Caiafa resigned from the FAA in 1989, he took this file and all his other personal files to his home in Marmora, New Jersey where he stored them in the basement. (Caiafa, Tr. 75-76.)

24. Caiafa testified that in 1986 and 1987 he banked at both First Jersey Bank and the FAA Credit Union located at his place of employment. The Bank and the Credit Union generated monthly and quarterly statements respectively. Caiafa further testified that the Credit Union also provided him with a record of each transaction.

25. Caiafa went on to testify that it was his practice to review the aforesaid statements and transaction records and to annotate the records so as to be able to identify the sources of the deposits, but "mostly [his] withdrawals." (Caiafa, Tr. 78-79.)

26. However, Caiafa also testified that he did not annotate all of his bank records. (Caiafa, Tr. 88.) Indeed, cash gambling winnings, if deposited into Caiafa's bank account, would not be recorded. (Caiafa, Tr. 89.)

27. Caiafa testified that he made notes on his copies of personal bank records that might refresh his recollection as to the nature of certain transactions,

28. Caiafa testified that such records, if they existed, although ostensibly used for official business, were purely personal and thus he did not keep such records in the FAA files. (Caiafa, Tr. 85-86.)

29. In the fall of 1993 Caiafa's basement flooded and all of the aforesaid records were destroyed and discarded by defendant. (Caiafa, Tr. 79.) Consequently, Caiafa contends that he has neither his personal files nor his personally annotated bank records to assist him in the refreshment of his recollection or to be used as substantive evidence to disprove the allegations of the indictment, including allegations that defendant received "kickbacks" in connection with contract 708.

30. However, Caiafa was unable to specifically identify anything that was contained in the personal file that would have related to the contract at issue in this case. (Caiafa, Tr. 87.)

31. Furthermore, Caiafa testified that annotations, if made, were not supported by other documentation. (Caiafa, Tr. 88.)

32. The Court notes that even if such notes existed, it is uncertain that they would be admissible in evidence. Moreover, Caiafa's contention that the notes might aid in refreshing his recollection is speculative.

33. The government has subpoenaed and preserved Caiafa's bank records.

34. The Court finds that Caiafa has failed to establish actual prejudice as a result of the alleged loss of these records.

Conclusions of Law

A speedy trial is guaranteed the accused by the Sixth Amendment to the United States Constitution. *Barker v. Wingo*, 407 U.S. 514, 515 (1972). The right to a speedy trial is very vague, as it is impossible to "determine with precision when the right has been denied." *Id.* Such claims must be analyzed under circumstances specific to each particular case. *Id.* at 522. Four factors which courts must consider in determining whether a defendant's right to a speedy trial has been violated are: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right[1] and (4) prejudice to the defendant. *Id.* at 530; *Hakeem v. Beyer*, 990 F.2d 750, 759-60 (3d Cir. 1993). All of these factors must be considered along with other relevant circumstances. *Id.* at 533.

The length of the delay is significant at two stages in a speedy trial claim analysis. *Hakeem*, 990 F.2d at 760; *see also Doggett v. United States*, 112 S. Ct. 2686, 2690 (1992). Initially courts must determine whether the delay was long enough to trigger the need for further inquiry. *Hakeem*, 990 F.2d at 760. Delays ranging in time from nine months to more than six years have been found to be presumptively prejudicial and therefore to require further inquiry. *See Id.* at 2690-91; *Barker*, 407 U.S. at 531 n.31; *Hakeem*, 990 F.2d at 760 (delay of fourteen months requires further inquiry); *United States v. Greer*, 655 F.2d 51, 52-53 (5th Cir. 1981) (fifteen month delay is presumptively

1. The Government does not argue, nor does the Court conclude, that defendants failed to timely assert their right to a speedy trial.

prejudicial and 10.5 month delay may be presumptively prejudicial). In the present case, the delay of approximately two and one half years between the defendants' indictment and arrest may be viewed as meeting the threshold requirement set forth in *Doggett*.

The length of the delay is also important because as it increases it "incrementally add[s] its weight to any actual harm that the record shows the defendant suffered." *Hakeem*, 990 F.2d at 760. The thirty month delay in the present case, however, is insufficient, in the absence of some specific harm to the defendants, for the Court to presume that they were prejudiced. *Hakeem* 990 F.2d at 764; *cf. Doggett*, 112 S. Ct. at 2694.

The second factor this Court must consider is the reason for the delay. In the present case, the indictment was sealed due to the Government's on-going investigation of individuals other than the defendants in the present case. The Government argues that any action prior to April of this year would have endangered its investigation. The Court concludes that while the Government's actions regarding each individual defendant may have been disadvantageous, the delay was nevertheless reasonable.

The next factor this Court must examine is the prejudice suffered by the defendants. The Third Circuit has emphasized three primary interests of defendants which the denial of the right to a speedy trial may prejudice: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused and (3) limiting the possibility that the defense will be impaired. *Government of Virgin Islands v. Burmingham*, 788 F.2d 933 (3d Cir. 1986). The first two factors are not applicable to the facts of the present case. Moreover, defendants have failed to establish with credible, persuasive testimony that their

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defense was prejudiced by the delay. They have not shown that they reasonably relied on the statements of DeNofa in destroying certain documents. DeNofa was a line investigator not directly employed by the FBI, the DOT or the DOD. Moreover, AS&T representatives failed to contact their attorney or the agencies conducting the investigation before deciding to destroy the documents. Defendant Caiafa also has not persuasively shown that the documents he contends are forever lost will impede his defense. The Government's preservation of the official unannotated bank records and the speculative nature of Caiafa's claim further weigh in favor of denying the defendants' motions.

The minor extent to which the delay may hamper the defense in the present case is insufficient to warrant a dismissal of the indictment in light of all of the other factors considered by this Court.

Conclusion

In light of the foregoing, the Court will deny the defendants' motions to dismiss the indictment. An appropriate Order is filed herewith.

September 1, 1994

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 91-480

UNITED STATES OF AMERICA

v.

CAESAR CAIAFA, et al.

ORDER

For the reasons set forth in the Opinion filed herewith, it is on this 1st day of September 1994

ORDERED that defendants' motions to dismiss the indictment be and hereby are **denied.**

s/ Anne E. Thompson
ANNE E. THOMPSON, U.S.D.J.

(2)

No. 95-1762

In the Supreme Court of the United States

OCTOBER TERM, 1995

BERNARD DEANNUNTIS, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners were denied a speedy trial in violation of the Sixth Amendment.

2. Whether the district court committed plain error in determining that petitioners' false statement was material rather than submitting the materiality element to the jury.

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment orders of the court of appeals (Pet. App. 1a-4a) are unreported, but the decisions are noted at 77 F.3d 474 (Table).

JURISDICTION

The judgments of the court of appeals were entered on January 31, 1996. The petition for a writ of certiorari was filed on April 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner DeAnnuntis and petitioner Atlantic Science and Technology, Inc. (AS&T) were convicted of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; making a false claim against the United States, in violation of 18 U.S.C. 287; and making a false statement, in violation of 18 U.S.C. 1001. Petitioner DeAnnuntis was sentenced to probation and a fine. Petitioner AS&T was sentenced to a $30,000 fine. The court of appeals affirmed. Pet. App. 1a-4a.

1. DeAnnuntis was the founder, owner, and a vice-president of AS&T, a private contractor that did business with the Federal Aviation Administration (FAA) Technical Center near Atlantic City, New Jersey. In 1985, DeAnnuntis and Cesar Caiafa, a FAA employee, conspired to obtain a government contract for AS&T by fraudulent means. The contract was to prepare a study relating to the airworthiness and certification of certain aircraft structures constructed of non-metallic materials. DeAnnuntis submitted a bid of $9,500 for the contract, which was below the $10,000 threshold for requiring competitive bidding. He had secretly arranged with Caiafa, however, to modify the contract later to pay AS&T an additional $6,800. During 1986, DeAnnuntis directed AS&T employee Ramon Garcia to bill some of his time to the FAA project even though Garcia did no work on the contract. Later, AS&T sent a bill to the FAA for $9,500. Lawrence Neri, an FAA official, falsely certified that AS&T was entitled to payment because it had fully satisfied the contract. As part of

the conspiracy, DeAnnuntis paid kickbacks to Caiafa. Gov't C.A. Br. 2-6.

In December 1986, AS&T submitted what it represented was a report to the FAA pursuant to the contract. In fact, the report had been cut-and-pasted together by Caiafa and Neri from previous reports prepared by FAA officials. Several days later, AS&T submitted a bill for an additional $6,800 to the FAA as payment for the report. Gov't C.A. Br. 6-7.

2. In 1988, the government commenced an investigation of AS&T. The Department of Defense and the Department of Transportation (DOT) worked jointly on an investigation in the Eastern District of Pennsylvania; meanwhile, the DOT and the FBI initiated a separate investigation in the District of New Jersey. On October 24, 1991, petitioners, Caiafa, and another FAA employee were indicted in the District of New Jersey. The government moved to seal the indictment because it was conducting a large, and as yet undisclosed, investigation at the FAA center in New Jersey, and it had several prospective witnesses, including Garcia, cooperating in that investigation. The district court granted that motion. In April 1994, the indictment was unsealed. Pet. App. 24a-25a.

In June 1994, petitioners moved to dismiss the indictment, claiming that their Sixth Amendment right to a speedy trial had been violated. In September 1994, the district court, after conducting a hearing, denied the motion. Applying the multi-factor test of *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972), the court held, first, that the 30-month delay between indictment and arrest was sufficient to require consideration of the cause for the delay and whether it had prejudiced petitioners, but that the delay did not give rise to a

presumption of prejudice. Pet. App. 30a-31a. The court then held that the delay had been reasonable, because it had resulted from the need to protect an ongoing investigation, *id.* at 31a, and that petitioners had failed to establish that the delay had prejudiced them. *Id.* at 31a-32a. Petitioners' trial began in October 1994. *Id.* at 24a-32a.

3. The Section 1001 count was based on the defendants' concealment of the fact that Caiafa and Neri—and not any AS&T employee—had written the report submitted to the FAA by AS&T. Petitioners' defense to that charge was that they had fully complied with their obligations under the contract with the FAA because, in their view, the contract did not require them to submit a final report to the FAA. At trial, the district court instructed the jury that, although materiality was an element of the Section 1001 charge, it was to be decided by the court. Petitioners did not object to that charge. The court found the fact, concealed by petitioners, that AS&T had not itself prepared the report to have been material. Pet. App. 12; Gov't C.A. Br. 46-51.

4. The court of appeals summarily affirmed petitioners' convictions in separate judgment orders. Pet. App. 1a-4a.

ARGUMENT

1. Petitioners first contend (Pet. 5-10) that the three-year period between their indictment and the commencement of trial violated their Sixth Amendment right to a speedy trial. In relying on *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972) and *Doggett* v. *United States*, 505 U.S. 647, 651 (1992), the district court applied the proper doctrinal test to that claim, and its application of that test was correct.

Under *Barker* and *Doggett*, a claim that a defendant's Sixth Amendment right to a speedy trial has been violated turns on a consideration of four factors: the length of the delay, the reason for the delay, whether the defendant asserted his right to a speedy trial, and whether the defendant was prejudiced by the delay. *Doggett*, 505 U.S. at 651; *Barker*, 407 U.S. at 530. As this Court has held, the length of the delay is a "triggering mechanism," in that, "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity to inquire into the other factors that go into the balance." *Barker*, 407 U.S. at 530. In cases where an indictment has been sealed and where the defendant was not previously arrested, the pertinent time period for determining whether the defendant's Sixth Amendment right to a speedy trial has been violated commences at the time that the indictment is unsealed. See *United States* v. *Lewis*, 907 F.2d 773, 774 & n.3 (8th Cir.), cert. denied, 498 U.S. 906 (1990); *United States* v. *Watson*, 599 F.2d 1149, 1156-1157 & n.5 (2d Cir. 1979), modified on other grounds, *United States* v. *Muse*, 633 F.2d 1041 (2d Cir. 1980) (en banc), cert. denied, 450 U.S. 984 (1981); *United States* v. *Hay*, 527 F.2d 990, 994 & n.4 (10th Cir. 1975), cert. denied, 425 U.S. 935 (1976).[1]

In this case, only six months passed between the unsealing of the indictment and petitioners' trial. That period was too short to warrant consideration of

[1] The constitutional right to a speedy trial is not activated until a criminal prosecution has commenced. See *United States* v. *Marion*, 404 U.S. 307, 313 (1971). As this Court has noted, other mechanisms exist to guard against pre-indictment delay, including the applicable statute of limitations and the Due Process Clause. *Id.* at 322; see also *Watson*, 599 F.2d at 1156-1157 n.5.

the other *Barker* factors. See *Doggett*, 505 U.S. at 652 n.1 (noting that one-year delay is the time that normally triggers consideration of the other *Barker* factors). But, even if those factors were considered, they offer no support for petitioners' Sixth Amendment claim, as the district court found. First, the sealing of the indictment for 30 months was prompted by the government's ongoing investigation into corruption at the FAA center. The need to prevent disclosure of an ongoing investigation is a legitimate ground for sealing an indictment and thereby delaying trial. See *United States* v. *Richard*, 943 F.2d 115, 118-119 (1st Cir. 1991); *United States* v. *Lakin*, 875 F.2d 168, 170-171 (8th Cir. 1989); *United States* v. *Ramey*, 791 F.2d 317, 320-321 (4th Cir. 1986); *United States* v. *Srulowitz*, 819 F.2d 37, 40 (2d Cir.), cert. denied, 484 U.S. 853 (1987).

Moreover, as the district court found, petitioners have not demonstrated that the delay prejudiced their defense. Petitioners argue that, in 1993, certain business records and computer discs were destroyed after a line investigator with a defense agency not employed by the FBI, the Defense Department, or the Department of the Treasury, informed them that the investigation had been completed. As the district court noted, however, petitioners failed to establish that they reasonably relied on the investigator's statement or that the lost documents would have assisted their defense. Pet. App. 32a. In any event, petitioners' conclusory claim of prejudice was insufficient to show actual prejudice. See *Doggett*, 505 U.S. at 656 (defendant must show "specific prejudice" when government has proceeded with reasonable

diligence); *United States* v. *Loud Hawk*, 474 U.S. 302, 315 (1986).[2]

2. Petitioners also claim (Pet. 10-13) that the district court committed plain error in deciding the question of whether petitioners' statement was materially false, rather than submitting that question to the jury. That claim also does not merit review. In *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), the Court held that, where materiality is an element of an offense, the Constitution requires that the jury determine whether that element has been established. Petitioners, whose trial occurred before *Gaudin* was decided, did not object to the district court's instruction. Accordingly, petitioners' claim is reviewed only for plain error. *United States* v. *Olano*, 507 U.S. 725 (1993). See *United States* v. *Gaudin*, 115 S. Ct. at 2320-2322 (Rehnquist, C.J., concurring). To establish plain error, a defendant must show that an error was committed, that the error was plain under current law, and that the error affected substantial rights. Even when that showing has been made, a reviewing court has discretion whether to correct the forfeited error, and should do so only when the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Olano*, 507 U.S. at 731-732.

In considering claims similar to petitioners', several courts of appeals have held that a *Gaudin* error, occurring in a trial before *Gaudin* was decided, is "plain" within the meaning of *Olano*. See, *e.g.*,

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[2] While petitioners satisfied the third *Barker* factor by asserting their right to a speedy trial shortly after the indictment was unsealed (Pet. App. 30a n.1), that factor alone is insufficient to establish a violation of the Sixth Amendment.

United States v. *David*, 83 F.3d 638, 645-646 (4th Cir. 1996); *United States* v. *Randazzo*, 80 F.3d 623, 630-632 (1st Cir. 1996); *United States* v. *McGuire*, 79 F.3d 1396, 1400-1405 (5th Cir. 1996). Whether a *Gaudin* error seriously affected the fairness, integrity, or public reputation of the judicial proceedings, however, is a case-specific inquiry that depends on such variables as the strength of the government's case on the issue of materiality and the extent to which the issue of materiality was disputed at trial. See *David*, 83 F.3d at 648.[3] Thus, where the government presents overwhelming evidence of guilt on the materiality element, reversal is not warranted. Compare *Randazzo*, 80 F.3d at 632 (conviction affirmed because evidence of guilt overwhelming) with *David*, 83 F.3d at 648 (conviction reversed because, among other things, the jury "could conceivably have concluded" that false statements were not material) and *McGuire*, 79 F.3d at 1405 (conviction reversed because of serious factual question regarding materiality).

The fact-specific question whether reversal was required in this case does not merit this Court's review. In any event, the court of appeals was correct in holding that petitioners' *Gaudin* claim did not merit reversal. To establish materiality, the government had to show that the information that petitioners concealed had a natural tendency to influence,

[3] The Ninth Circuit has recently granted rehearing en banc to consider this prong of the plain error inquiry in a case involving *Gaudin* error. See *United States* v. *Keys*, 78 F.3d 465 (9th Cir. 1996) (granting rehearing en banc in *United States* v. *Keys*, 67 F.3d 801, 811 (9th Cir. 1995) (holding that *Gaudin* error does not "seriously affect the fairness, integrity, or public reputation of judicial proceedings" when there was no "serious factual question" regarding materiality at trial)).

or was capable of influencing, the decision of the FAA. *Gaudin*, 115 S. Ct. at 2313. Here, the government's evidence showed that petitioners submitted a document that purported to be an independent report to the FAA but that, in fact, had been written by FAA personnel. Petitioners' submission for reimbursement based on the false pretense that they had complied with the contract by preparing that report was material, because "a claim based on a service that was not performed is * * * a material misstatement." *United States* v. *Adler*, 623 F.2d 1287, 1291 (8th Cir. 1980). Moreover, petitioners did not argue that, if the contract required AS&T to prepare a report for the FAA, the fact that the report had actually been prepared by FAA officials would be immaterial. Rather, they argued that the contract did not require the preparation of a report by AS&T, but merely required AS&T to present its own research to the FAA. That issue was submitted to the jury in connection with the element requiring it to find that the defendants had concealed information from the FAA. Gov't C.A. Br. 27. Under those circumstances, the court of appeals was correct to recognize that the *Gaudin* error did not seriously affect the fairness, integrity, or public reputation of the proceedings below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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